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In the Supreme Court of the United States

OCTOBER TERM, 1996

C & D CHARTER POWER SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by suspending and then discharging employee Robert Williamson because he engaged in protected activity.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. C1-C2) is unpublished, but the decision is noted at 88 F.3d 1278 (Table). The decision and order of the National Labor Relations Board (Pet. App. A1-A5), and the decision of the administrative law judge (Pet. App. B1-B24), are reported at 318 N.L.R.B. 798.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. The petition for a writ of certiorari was filed on August 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]" of the Act. Section 7 of the Act, 29 U.S.C. 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

2. Petitioner manufactures batteries at a plant in Huguenot, New York. In the fall of 1990, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Union) launched an organizing campaign at the plant. Pet. App. B2-B3. During the Union's campaign (which culminated in an election on January 31, 1991), petitioner held a series of 50 or 60 anti-union meetings with employees in the plant during working time. Employees resented the meetings, because attendance was mandatory, thereby causing employees to lose the opportunity to earn extra income on the production line under petitioner's piece-incentive program. *Id.* at A2.

One such mandatory meeting was held on January 25, 1991. At that meeting, Arthur Imdorf, the plant

manager, made a presentation to the employees. After Imdorf's presentation, Robert Williamson, an active Union supporter, raised his hand, stated that he had a two-part question, and asked Imdorf, "How many more of these meetings are we going to have?" Imdorf heatedly replied: "I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore." Imdorf then told Williamson to proceed with his question. In response, Williamson initially remarked, "you're worthless," but then immediately retracted his comment and clarified that "I don't mean you personally, but the question was worthless." Pet. App. A2-A3, B6, B17.

At the conclusion of the January 25 meeting, Harry Fronjian, petitioner's human relations manager, confronted Williamson about his remark to Imdorf and informed him that "because of what you've done, we're going to have to suspend you pending further evaluation." Pet. App. B6, B17. Williamson asked Fronjian, "why don't you do what you really want to do and fire me[?]" *Id.* at B7. Williamson then left Fronjian's office and, shouting expletives, proceeded to the locker room, where he encountered John Tice, a supervisor. There, Tice told Williamson, "I understand that you've quit, and you know that's the way we're going to record it and we'll let the unemployment know." *Ibid.* Angered by Tice's assertion that he had "quit," Williamson slammed his locker shut and pounded on it. *Id.* at B19.

On January 29, 1991, four days after Fronjian suspended him, Williamson wrote to Imdorf, inquiring when he could return to work. On January 31, Imdorf informed Williamson that "you no longer are con-

sidered to be an employee of [petitioner]." Pet. App. B18 n.4.

3. Upon charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner alleging, among other things, that its discharge of Williamson violated Section 8(a)(1) and (3) of the Act. Pet. App. B1-B2. Following a hearing, the administrative law judge (ALJ) sustained the allegation. *Id.* at B21, B24.

First, the ALJ found that Williamson's "you're worthless" remark during the January 25 meeting was protected by Section 7. Pet. App. B17. The ALJ explained that the remark "came in the context of protected activity," and it constituted a permissible "'spontaneous outburst' during the question and answer period," *ibid.* (quoting *Caterpillar Tractor Co.*, 276 N.L.R.B. 1323, 1326 (1985)), rather than an "offensive, vulgar, defamatory, or opprobrious" remark of the kind falling outside of the Act's protection. Pet. App. B17 (quoting *Reef Industries, Inc.*, 300 N.L.R.B. 956, 961 (1990), enforcement granted, 952 F.2d 830 (5th Cir. 1991)).

Second, the ALJ found that Williamson's protected activity at the January 25 meeting was "the very reason why" petitioner discharged him. Pet. App. B20.[1] In so finding, the ALJ considered and rejected several explanations that petitioner proffered as the actual reasons motivating the discharge. *Id.* at B18-B19. Petitioner contended that it discharged William-

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[1] The ALJ found that Williamson's January 25 suspension effectively became a discharge as of January 31, the date on which Imdorf informed Williamson that petitioner no longer considered him to be an employee. Pet. App. B18 n.4.

son, not because of his protected activity during the January 25 meeting, but because he subsequently had used profanity as he exited Fronjian's office and damaged company property (his locker) in reaction to supervisor Tice's assertion that he had "quit." *Id.* at B19. The ALJ held, however, that petitioner's explanations were pretextual, because the use of profanity was commonplace in the plant, the lockers were generally in poor condition, and "[t]he record does not show the extent of the damage, if any, Williamson caused to the locker." *Ibid.* The ALJ also rejected petitioner's contention that it discharged Williamson, not because of his protected activity, but because he subsequently had allegedly threatened to kill supervisor Tice. The ALJ found instead that "[petitioner] has not shown by a preponderance of the evidence that the threat was made." *Ibid.*

Lastly, the ALJ concluded that, even if Williamson's use of profanity and damage to the locker were not pretexts, but, rather, a dual motive for the discharge (along with the unlawful motive), petitioner had failed to "sustain[ ] its burden of showing that the 'same action would have taken place even in the absence of the protected conduct,'" because "[n]o showing has been made that employees were * * * discharged * * * for similar activities." Pet. App. B20-B21 (citing *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)).

The Board adopted the ALJ's findings and conclusions, and ordered petitioner to reinstate Williamson with backpay. Pet. App. A1, A4-A5, B23.

4. The court of appeals enforced the Board's order in an unpublished summary decision. Pet. App. C1-C2. The court held that substantial evidence sup-

ported the Board's finding that petitioner's discharge of Williamson violated the Act. *Id.* at C2.

ARGUMENT

1. Petitioner's principal contention is that this case presents "the issue as to the proper analysis to be used when confronted with a mixed motive employment decision" (Pet. 21), that is, an employment decision that "was motivated by both lawful and discriminatory reasons" (Pet. 11).[2] Petitioner contends (Pet. 11-18) that a conflict among the courts of appeals exists on that issue. Petitioner further asserts (Pet. 19) that the Board "failed to consider or resolve the

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[2] In this Court, petitioner does not challenge the Board's ruling (Pet. App. A3-A4) that Williamson's conduct during the January 25 meeting constituted "concerted" activity within the meaning of Section 7 of the Act. Before the Board, petitioner contended that Williamson's conduct during the January 25 meeting was not protected by the Act because it was not "concerted" under Section 7. Pet. App. A2. The Board rejected that contention, concluding that Williamson's comments constituted concerted activity "because they were the logical outgrowth of the prior concerted complaints the employees voiced about being required to attend [petitioner's] numerous meetings and to lose the incentive pay they could otherwise be earning." *Id.* at A3-A4. Petitioner did not challenge the Board's ruling in the court of appeals, and it is not at issue here. The Board also found, in agreement with the ALJ, that Al Weber, petitioner's president, delivered a speech on December 21, 1990, in which he unlawfully threatened employees with plant closure if they voted for the Union. *Id.* at A1, B10-B11, B21. The court of appeals sustained the Board's finding, concluding that petitioner had advanced "no intelligible arguments" to the contrary. *Id.* at C2. In this Court, while petitioner continues to characterize Weber's speech as "lawful" (Pet. 5), it does not actually challenge the Board's ruling to the contrary.

issue of a dual motive or the requisite analysis" respecting Williamson's discharge.

This case, however, does not actually present the issues raised by petitioner. The ALJ, whose finding was adopted by the Board and upheld by the court of appeals, concluded that petitioner's decision to discharge Williamson was *not* attributable to mixed motives. Rather, Williamson's protected activity was "the very reason why" petitioner discharged him, and its allegedly lawful justifications for the discharge—his using profanity, damaging the locker, and threatening supervisor Tice after the January 25 meeting—were mere pretexts. Pet. App. B19, B20.

Accordingly, the question presented by this case is whether substantial evidence supports the Board's finding that petitioner's allegedly lawful justifications for Williamson's discharge were in fact pretextual.[3] The court of appeals answered that question in the affirmative. Pet. App. C2. Although petitioner apparently disagrees with the court's holding (see Pet. 24-26), the court's assessment of the evidentiary record raises no issue warranting further review by this Court, particularly where, as here (see Pet. 19-21; Pet. App. A1 n.1), petitioner's main disagreement with the decision below is with the ALJ's credibility determinations, which the Board in turn upheld. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[4]

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[3] It is well settled that "if the employer fires an employee for having engaged in union activities and * * * the reasons that he proffers are pretextual, the employer commits an unfair labor practice." *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

[4] As the Court explained in *Universal Camera Corp.*: "Whether on the record as a whole there is substantial evidence

2. In any event, the contentions advanced by petitioner are without merit.

a. In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), this Court upheld the rules governing "dual motive" or "mixed motive" cases established by the Board in *Wright Line, Inc.*, *supra*. 462 U.S. at 400-403. As the Court explained:

> [T]he General Counsel * * * ha[s] the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge. Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of §§ 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event.

Id. at 400 (footnote omitted); see also *id.* at 399 & n.4. The Board and the court of appeals properly affirmed the ALJ's finding that the General Counsel had met his burden, and that petitioner had failed to sustain its affirmative defense. Pet. App. A1-A4; *id.* at C2.

b. Petitioner mischaracterizes the record in contending (Pet. 19) that the ALJ and the Board "failed to consider or resolve the issue of a dual motive or the

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to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U.S. at 491. Petitioner has not demonstrated that the decision below is one of those "rare instances" in which the substantial evidence test has been so "misapprehended or grossly misapplied" by the court of appeals as to warrant this Court's intervention.

requisite analysis" in connection with Williamson's discharge. As noted, the ALJ found that petitioner's proffered lawful justifications for discharging Williamson were pretextual. Pet. App. B19. The ALJ went on to conclude that, even if petitioner's proffered lawful explanations for the discharge were not merely pretextual, but, rather, constituted a dual motive (along with its unlawful, retaliatory motive), the discharge of Williamson nonetheless violated the Act, because petitioner made "[n]o showing" that other employees had been discharged for similar acts of alleged misconduct. *Id.* at B20-B21 (applying *Wright Line, Inc.*). And, far from "fail[ing] to consider" the issue (Pet. 19), the Board in fact adopted the ALJ's conclusions. Pet. App. A1.

Petitioner's related contention (Pet. 11, 16-18) that there is a conflict among the courts of appeals as to the proper legal framework for analyzing mixed-motive discharge cases under the Act also lacks merit. The decisions upon which petitioner relies (Pet. 16-18) for the alleged circuit conflict all pre-date this Court's decision in *Transportation Management Corp., supra.* By upholding the Board's *Wright Line, Inc.* decision as a reasonable construction of the Act, the Court in *Transportation Management Corp.* fully resolved the circuit conflict to which petitioner refers. See 462 U.S. at 397 & n.3, 400-403.

3. Petitioner invites this Court to hold that Section 107 of the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1075 (42 U.S.C. 2000e-2(m), 2000e-5(g)(2)(B)), applies to mixed-motive cases arising under the National Labor Relations Act and limits the Board's remedial authority in such cases.

Pet. 21-24, 27.[5] The Court should decline petitioner's invitation, for its claim is not properly presented and, in any event, is unpersuasive.

a. Petitioner did not raise its Section 107 claim before the Board or the court of appeals. Petitioner's failure to advance that claim before the Board creates a jurisdictional bar to its consideration in judicial proceedings reviewing the Board's order. See Section 10(e) of the Act, 29 U.S.C. 160(e);[6] *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). Moreover, because petitioner did not raise its claim in the court below, petitioner has failed to preserve it for

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[5] Section 107 amended the Civil Rights Act of 1964 in two respects. First, Section 107(a) (105 Stat. 1075) added a new subsection to the statute, 42 U.S.C. 2000e-2(m), which provides: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Second, Section 107(b) (105 Stat. 1075) added a new subparagraph to the statute, 42 U.S.C. 2000e-5(g)(2)(B), which provides: "On a claim in which an individual proves a violation under section [2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court * * * may grant declaratory relief, injunctive relief * * * and attorney's fees * * * and * * * shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."

[6] Section 10(e) provides, in relevant part: "No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has alleged no such "extraordinary circumstances" here.

review here. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

b. In any event, petitioner's Section 107 claim lacks merit. Petitioner cites no authority applying Section 107 of the CRA in analogous circumstances, nor any provision of the CRA or its legislative history to demonstrate that Congress intended the CRA to supplant the NLRA as it had been construed by this Court in *Transportation Management Corp.*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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